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Attorneys for Defendant CH<sub>2</sub>O, Inc.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MERAS ENGINEERING INC., a  
California corporation, RICH BERNIER  
and JAY SUGHROUE,

Plaintiffs,

v.

CH<sub>2</sub>O, Inc., a Washington Corporation

Defendant

s.

Case No. 11-0389 LB

**MOTION TO DISMISS PLAINTIFFS'  
COMPLAINT FOR DECLARATORY  
RELIEF AND UNFAIR COMPETITION  
AND MEMORANDUM IN SUPPORT  
THEREOF**

Date: April 21, 2011

Time: 11:00 a.m.

Dept.: Courtroom #4

Judge: Hon. Laurel Beeler

**MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR  
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**I. MOTION**

COMES NOW Defendants CH<sub>2</sub>O, Inc., by and through its attorneys, PETER T. PETRICH and DAVIES PEARSON, P.C., *pro hac vice*, and moves this Court to dismiss this action for declaratory judgment and unfair competition on the following grounds:

1. Defendants filed an action in the Superior Court for the State of Washington in and for the County of Thurston, Cause No. 11-2-00323-7, involving the same issues and parties as are involved in the present action.
2. Plaintiffs have removed the Thurston County, Washington matter to the United States District Court, Western District of Washington (3:11-cv-05153-RJB) and have filed a Motion to Dismiss, Stay, or in the Alternative, Transfer Venue and Jurisdiction to the US District Court, Northern District of California. This motion is currently set for hearing on April 8, 2011.
3. The issues involved in both proceedings are fully determinable by the pending proceeding in the US District Court for the Western District of Washington.
4. The rights of the parties to this declaratory judgment action will not be unreasonably jeopardized by delay or otherwise if this action is dismissed in the Northern District of California.

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13).<sup>1</sup> Thus, the agreements contained both choice of law and forum selection provisions.

The parties freely negotiated and entered these agreements governed by, and valid under, Washington law. Among the provisions contained in these agreements are provisions preventing Mr. Bernier and Mr. Sughroue from competing with CH<sub>2</sub>O, Inc. for a reasonable time after ceasing to be employed by CH<sub>2</sub>O, Inc. and within a reasonable geographical area. (Exhibit A, ¶6). These provisions are valid and enforceable under Washington law. Nevertheless, the Washington State action does not seek to prevent Mr. Bernier or Mr. Sughroue from working with a competitor. Rather, the Washington litigation seeks to protect CH<sub>2</sub>O's trade secrets, property information and data, and restrain Mr. Bernier and Mr. Sughroue from soliciting their former CH<sub>2</sub>O customers.

Despite the valid employment agreements governing their relationship with CH<sub>2</sub>O, Inc., after working for CH<sub>2</sub>O, Inc. for about one year, Mr. Bernier and Mr. Sughroue voluntarily terminated their employment with CH<sub>2</sub>O, Inc. on January 25, 2011. Then, on January 26, 2011, Mr. Bernier and Mr. Sughroue began working for Meras Engineering, Inc. Also, on January 26, 2011, Mr. Bernier and Mr. Sughroue, along with their new employer, Mersas Engineering, Inc., filed this declaratory judgment action in this Court.

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<sup>1</sup> Copies of the pertinent employment agreements are attached as Exhibit A to Plaintiffs' operative Complaint and are cited throughout as "Exhibit A."

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1           **B. Issue Presented**

2           District courts have no obligation to decide declaratory judgment actions and  
 3           have broad discretion to dismiss such actions. In exercising that discretion, district  
 4           courts consider the circumstances as of the time they rule on requests for a declaration  
 5           and consider several factors, including: whether the parties can fully resolve all issues  
 6           in a pending state court action and whether the plaintiff filed suit in anticipation of  
 7           litigation from the defendant. The plaintiffs filed suit on the first day that CH<sub>2</sub>O, Inc.  
 8           had a possible cause of action and there is now a pending state action in which all  
 9           matters at issue may be fully litigated. Should this court grant this Motion to Dismiss  
 10          the Declaratory Judgment and Unfair Competition action?

11          **C. Argument**

12           **a. This Court Is Well Within Its Discretion to Dismiss The**  
 13           **Declaratory Action**

14          This Court should dismiss the Complaint for Declaratory Judgment and Unfair  
 15          Competition because the Plaintiffs filed suit in California in anticipation of suit by  
 16          CH<sub>2</sub>O, Inc. in Washington. The Supreme Court has long declared that federal courts  
 17          have broad discretion in granting motions to dismiss declaratory actions. *Brillhart v.*  
 18          *Excess Ins. Co. of America*, 316 U.S. 491, 495, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942).  
 19          This discretion to dismiss declaratory actions extends even to cases where the federal  
 20          court has jurisdiction and district courts are under “no compulsion to exercise that  
 21          jurisdiction.” *Id.* This extensive discretion to dismiss declaratory actions exists because  
 22          the Declaratory Judgment Act is “enabling [...] and] confers discretion on the courts

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1 rather than an absolute right on the litigants.” *Wilton v. Seven Falls Co.*, 515 U.S. 277,  
 2 289-90, 115 S.Ct. 2137, 132 L.Ed. 214 (1995). Indeed, the Supreme Court found that  
 3 the Declaratory Judgment Act creates an opportunity – not a duty – for the courts to  
 4 grant relief in certain instances but that federal courts are not obligated to issue  
 5 declaratory judgments. *Id.* at 288.

6 Underlying this broad discretion are policies in favor of judicial economy,  
 7 federalism, equity, and opposition to forum shopping. As the Court found in *Brillhart*:

8 Ordinarily it would be uneconomical as well as vexatious  
 9 for a federal court to proceed in a declaratory judgment suit  
 10 where another suit is pending in a state court presenting the  
 11 same issues, not governed by federal law, between the  
 12 same parties.

13 *Brillhart*, 316 U.S. at 495. The Court has enumerated a non-exhaustive list of factors  
 14 courts should consider in determining whether or not to exercise their jurisdiction in  
 15 declaratory actions when there is a case between the same parties regarding the same  
 16 issues pending in state court. These factors include:

- 17 • Whether the issues could be better settled in a proceeding pending  
 18 in state court; *Brillhart*, 316 U.S. at 495.
- 19 • Whether the declaratory action filing was reactive; *Wilton*, 515  
 20 U.S. at 280.
- 21 • Whether the declaratory action would result in piecemeal  
 22 litigation; *Id.* And,
- 23 • Whether the declaratory action filing constituted forum shopping.  
 24 *Id.*

25 This declaratory action meets each of the above-enumerated factors. The issues

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1 in this declaratory action could be more expediently resolved in the pending  
 2 Washington District Court action. The relationship between CH<sub>2</sub>O, Inc., Mr. Bernier  
 3 and Mr. Sughroue is governed by the Employment Agreements and those Agreements  
 4 are subject to the laws of the State of Washington and subject to an exclusive forum  
 5 selection provision in Thurston County, Washington. Indeed, within one week of Mr.  
 6 Bernier and Mr. Sughroue beginning work for Meras Engineering, Inc., CH<sub>2</sub>O, Inc.  
 7 filed suit in Thurston County Superior Court, the venue specifically selected in the  
 8 Employment Agreements at issue. The pending state court action arises directly out of  
 9 Mr. Bernier and Mr. Sughroue's breach of their Employment Agreements and  
 10 encompasses all of the issues of the declaratory action. Moreover, in the state court  
 11 action, CH<sub>2</sub>O, Inc. elected not to name Meras Engineering, Inc. as a party and not to  
 12 challenge Mr. Bernier and Mr. Sughroue's ability to work for Meras Engineering, Inc.,  
 13 notwithstanding their agreement not to compete. Instead, CH<sub>2</sub>O, Inc. is focused on  
 14 seeking redress for its breached employment contract and protecting its trade secrets.

15 Furthermore, this declaratory action was filed in reaction to anticipated  
 16 litigation in Thurston County, Washington and would result in piecemeal litigation if it  
 17 is not dismissed. Specifically, the Plaintiffs filed this declaratory action on the same  
 18 day that they began working for Meras Engineering, Inc. As they filed this suit the  
 19 very day that they breached their employment agreements, the only reasonable  
 20 conclusion is that they intended to win the race to the courthouse and preempt CH<sub>2</sub>O,  
 21 Inc. from bringing suit for breach of employment contract in the parties' predetermined  
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1 forum. Since the parties' relationship is controlled by the Employment Agreements  
 2 which are subject to Washington laws and suit is underway in the District Court in  
 3 Washington, judicial inefficiency and piecemeal litigation is certain to result if this  
 4 declaratory judgment action continues.

5 As the preemptive declaratory judgment filing in the Northern District of  
 6 California based on Diversity of Citizenship would apply the laws of the State of  
 7 California—which differ from the laws expressly governing the parties' Employment  
 8 Agreements—Mr. Bernier and Mr. Sughroue apparently intended to circumvent their  
 9 freely negotiated Employment Agreements and shop for what they perceived to be a  
 10 more favorable forum in which to litigate their breach of their Employment  
 11 Agreements. Such action undoubtedly constitutes forum shopping and weighs in favor  
 12 of this court dismissing this declaratory action.

13 ***b. The First-Filed Declaratory Judgment Action Is Not In “Preferred***  
 14 ***Position” And Dismissal In Favor Of The State Court Action Is Proper***

15 Even though this declaratory action was filed days before the action in Thurston  
 16 County, a district court's discretion in dismissing declaratory actions is not hindered by  
 17 the “First to File Rule,” as such a mechanical rule would run afoul of the purpose of the  
 18 Declaratory Judgment Act. For example, in *Wilton*, the Supreme Court upheld the  
 19 district court's discretion in dismissing the diversity of citizenship-based declaratory  
 20 action in favor of a state court action between the parties concerning the same issues  
 21 even though the state court action was filed a month after the declaratory action.

22 *Wilton*, 515 U.S. at 280. There, since the declaratory action was filed in anticipation of

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1 state court litigation and suit in state court was timely brought, the Supreme Court  
 2 ratified the district court's exercise of its discretion to stay the declaratory action to  
 3 avoid piecemeal litigation and to thwart forum shopping. *Id.* Thus, district courts are  
 4 within their discretion to stay declaratory actions "where parallel proceedings,  
 5 presenting opportunity for ventilation of the same issues, [are] underway in state court."  
 6 *Id.* at 290.

7 The Ninth Circuit adopted the plain meaning of the Supreme Court's *Wilton*  
 8 holding and found:

9 The Court's holding in *Wilton* makes clear that a district  
 10 court may consider the circumstances as they exist at the  
 11 time it rules on a request for declaration. Thus, [...] a  
 12 district court is authorized, in the sound exercise of its  
 13 discretion, to stay or dismiss an action seeking declaratory  
 14 judgment before trial or after all arguments have drawn to a  
 15 close.

16 *Polido v. State Farm Mutual Automobile Ins. Co.*, 110 F.3d 1418, 1422 (9<sup>th</sup> Cir. 1997),  
 17 overruled on other grounds. Therefore, this Court would be well within its discretion to  
 18 grant this Motion to Dismiss in favor of the Washington action because that action is  
 19 currently pending and provides a suitable—and pre-agreed—forum for the parties to  
 20 adjudicate all issues relating to their Employment Agreements.

21 Moreover, the *Polido* Court found that the proper inquiry in determining whether or  
 22 not to exercise its discretion in reaching the merits of a declaratory action is:

23 whether or not there [is] a procedural vehicle available to  
 24 the [declaratory judgment plaintiff] in state court [...] if a  
 25 state court remedy is available [...], the district court must  
 26 consider whether circumstances exist that overcome the

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1                   ‘presumption that the entire suit should be heard in state  
2                   court’ to prevent forum shopping and piecemeal litigation  
3                   of complex state law issues.

4                   *Id.* at 1423, citing *Chamberlain v. Allstate Ins. Co.*, 931 F.2d 1361, 1367 (9th Cir. 1991),  
5                   emphasis added. Here, there is a procedural vehicle available to Mr. Bernier and Mr.  
6                   Sughrue in the Washington suit. As they agreed to litigate all disputes arising out of  
7                   their Employment Agreements in Thurston County and there is a suit currently pending  
8                   there, they are unable to surmount the presumption that their entire dispute should be  
9                   litigated in Washington to prevent forum shopping and piecemeal litigation.

10                  To allow Mr. Bernier and Mr. Sughrue to circumvent their Employment  
11                  Agreements would thwart the forum selection clause they agreed to with CH<sub>2</sub>O, Inc., and  
12                  would be contrary to the purposes of the Declaratory Judgment Act. Indeed, as the Ninth  
13                  Circuit recently decided:

14                         The fact that the [declaratory judgment plaintiffs] won the  
15                         race to the courthouse by several days does not place  
16                         [them] in preferred position. In *Wilton*, the Supreme Court  
17                         suggested that the order of filing is legally insignificant  
18                         when it ruled in favor of a state action filed several weeks  
19                         after a federal action.

20                  *Huth v. Hartford Ins. Co. of the Midwest*, 298 F.3d 800, 804 (9th Cir. 2002). Therefore,  
21                  despite the fact that the declaratory action was filed days before the state court action,  
22                  Mr. Bernier, Mr. Sughrue and Meras Engineering, Inc. are not in preferred position.  
23                  Rather, the fact that they filed first in time by a few days is legally insignificant in  
24                  determining priority. Therefore, this Court should dismiss the declaratory action in favor  
25                  of the Washington action because the order of filing is not dispositive and the preemptive

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